Supreme Court U.S.
FILED
MAR 28 2002
OFFICE OF THE CLERK

No. 01-1236

In The

Supreme Court of the United States

SANDRA K. NORTON,

Petitioner,

v.

ANTHONY CATANESE, RICHARD OSBURN, JAMES MALEK, DAVID ANDERSON, ONDINA FELIPE, CARLA COLEMAN, JEAN L. BALDET, and LYNDA QUILLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL B. DAVIS
Counsel of Record
PAXTON & SMITH, P.A.
Barristers Building, Suite 500
1615 Forum Place
West Palm Beach, FL 33401
Phone: (561) 684-2121
Fax: (561) 684-6855
Counsel for all Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. PROCEEDINGS BELOW 1

B. STATEMENT OF FACTS 4

REASONS FOR DENYING THE PETITION 12

I THE PETITIONER'S FIRST ARGUMENT FOR CERTIORARI REVIEW SHOULD BE REJECTED FOR TWO REASONS: FIRST, THE CONFLICT IDENTIFIED BY THE PETITIONER IS LIMITED IN EXTENT, INVOLVING ONE DECISION IN ONE CIRCUIT ON ONE SIDE AND THE GREAT MAJORITY OF CIRCUITS INCLUDING THE ELEVENTH CIRCUIT, ON THE OTHER, AND SECOND, A RULING UPON THE ISSUE IN THIS CASE WOULD NOT BE MEANINGFUL IN RESOLVING THE DISPUTE BETWEEN THE PARTIES SINCE, EVEN IF THE "PUBLIC CONCERN" ELEMENT WERE HELD INAPPLICABLE TO PETITION CASES, THE RULE APPLYING IT WAS ESTABLISHED IN THE ELEVENTH CIRCUIT AT THE TIME OF THE ALLEGED RETALIATION AND THE DEFENDANTS WOULD STILL BE ENTITLED TO DISMISSAL UPON QUALIFIED IMMUNITY AS THEIR ALLEGED CONDUCT WAS NOT CLEARLY UNLAWFUL AT THE TIME IT OCCURRED 12

TABLE OF CONTENTS – Continued

Page

II THE PETITIONER'S SECOND ARGUMENT FOR CERTIORARI REVIEW SHOULD BE REJECTED SINCE THE CONFLICT AMONG THE CIRCUITS IDENTIFIED BY THE PETITIONER IS ILLUSORY AND SINCE THE FACTS ALLEGED BELOW CLEARLY ESTABLISH THE PROPRIETY OF APPLYING THE "PUBLIC CONCERN" RULE AS WAS DONE BY THE COURTS BELOW..... 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Altman v. Hurst, 734 F.2d 1240 (7th Cir. 1984) 16

Ansley v. Heinrich, 925 F.2d 1339 (11th Cir. 1991) 17

Auriemma v. Rice, 910 F.2d 1449 (7th Cir. 1990), *cert. denied*, 501 U.S. 1204, 111 S.Ct. 2796, 115 L.Ed.2d 970 (1991)..... 21

Badia v. City of Miami, 133 F.3d 1443 (11th Cir. 1998).....17, 22

Beaulieu v. United States, 497 U.S. 1038, 110 S.Ct. 3302, 111 L.Ed.2d 811 (1990) (White, dissenting) 13

Belk v. Town of Minocqua, 858 F.2d 1258 (7th Cir. 1988)..... 16

Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)..... *passim*

Cromer v. Brown, 88 F.3d 1315 (4th Cir. 1996)..... 21

Day v. South Park Indep. Sch. Dist., 768 F.2d 696 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101, 106 S.Ct. 883, 88 L.Ed.2d 918 (1986)..... 15

Gable v. Lewis, 201 F.3d 769 (6th Cir. 2000) 14, 16

Gearhart v. Thorne, 768 F.2d 1072 (9th Cir. 1985) 16

Greco v. Orange Memorial Hospital Corp., 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376 (1975)..... 13

Grigley v. City of Atlanta, 136 F.3d 752 (11th Cir. 1998), *cert. denied*, 525 U.S. 819, 119 S.Ct. 59, 142 L.Ed.2d 47 (1998).....16, 22

TABLE OF AUTHORITIES – Continued

Page

Harrison v. Springdale Water & Sewer Com'n, 780 F.2d 1422 (8th Cir. 1986) 15

Hoffman v. Mayor, Councilmen and Citizens of Liberty, 905 F.2d 229 (8th Cir. 1990) 16

Holbrook v. City of Alpharetta, Ga., 112 F.3d 1522 (11th Cir. 1997) 22

Martin v. City of Del City, 179 F.3d 882 (10th Cir. 1999) 16

Morgan v. Ford, 6 F.3d 750 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221, 114 S.Ct. 2708, 129 L.Ed.2d 836 (1994) 16, 17

Rathjen v. Litchfield, 878 F.2d 836 (5th Cir. 1989) 15

Rendish v. City of Tacoma, 123 F.3d 1216 (9th Cir. 1997), *cert. denied*, 524 U.S. 952, 118 S.Ct. 2368, 141 L.Ed.2d 737 (1998) 16

Rice v. Ohio Dept. of Transp., 887 F.2d 716 (6th Cir. 1989), *cert. denied*, 512 U.S. 1207, 114 S.Ct. 2678, 129 L.Ed.2d 812 (1994) 14, 16

Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988) 21

San Filippo v. Bongiovanni, 30 F.3d 424 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082, 115 S.Ct. 735, 130 L.Ed.2d 638 (1995) 13, 16

Schalk v. Gallemore, 906 F.2d 491 (10th Cir. 1990) 14, 15

Stuckett v. United States Postal Service, 469 U.S. 898, 105 S.Ct. 274, 83 L.Ed.2d 210 (1984) (White, dissenting) 13

Tao v. Freeh, 27 F.3d 635 (D.C. Cir. 1994) 21

TABLE OF AUTHORITIES – Continued

Page

Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999) 15

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 79 S.Ct. 710, 3 L.Ed.2d 723 (1959) 13, 17

Valot v. Southeast Local School Dist. Bd. of Education, 107 F.3d 1220 (6th Cir. 1997), *cert. denied*, 522 U.S. 861, 118 S.Ct. 164, 139 L.Ed.2d 108 (1997).....14, 16

White Plains Towing Corp. v. Patterson, 991 F.2d 1049 (2d Cir. 1993), *cert. denied*, 510 U.S. 865, 114 S.Ct. 185, 126 L.Ed.2d. 144 (1993) 15

Zorzi v. County of Putnam, 30 F.3d 885 (7th Cir. 1994) 16

LAWS AND STATUTES

Equal Pay Act of 1963
20 U.S.C. § 206 1

42 U.S.C. § 1983 ..... 1, 2, 3, 7, 20

§ 229.003(5)(A)
Florida Statutes (2001) 5

LAW REVIEW ARTICLE

Strauss, Note: *Public Employees' Freedom of Association: Should Connick v. Myers' Speech-Based Public-Concern Rule Apply*, 61 Fordham L.Rev. 473 (1992) 14

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

Sandra K. Norton brought suit in the United States District Court, Southern District of Florida, naming as Defendants Florida Atlantic University and six members of its administration: Anthony James Catanese, Richard L. Osburn, James S. Malek, David Anderson, Ondina Fel pe and Carla L. Coleman. (R1-1). Her initial Complaint, filed on January 7, 1997, set out four separate claims: a claim under 42 U.S.C. § 1983 against the six individual defendants for alleged violation of her rights under the First and Fourteenth Amendments (claiming that the individual defendants undertook retaliatory action against her after she sought certain documents in connection with a personal employment dispute and then brought a mandamus action in state court to compel release of those documents by the University); a claim against the University for alleged violation of the Equal Pay Act of 1963, 20 U.S.C. § 206 *et seq.* (claiming she was paid less as a faculty member than other similarly situated male faculty members), and two state law claims, one for declaratory relief against the University (asking that she be determined to be the proper holder of an endowed chair at the University), and another for alleged breach of contract (claiming that the University had breached a contract with her by allegedly removing her from the endowed chair). (R1-1).

Each Defendant moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). (R19-1; R21-1; R24-1; R25-1; R26-1; R27-1; R28-1). Norton then moved for leave to

amend her Complaint, which the Court granted on March 10, 1997. (R39-1; R41-1).

Norton's Amended Complaint substituted The Board of Regents of the Division of Universities of the Florida Department of Education (BOR) for the University, since the latter was not an entity capable of being sued. Other than this substitution, the Amended Complaint contained a slight modification of the claim under 42 U.S.C. § 1983. (R42-1).

The individual Defendants again moved to dismiss pursuant to Rule 12(b)(6), as did the BOR. (R45-1; R46-1; R47-1; R48-1; R50-1; R52-1; R563-1). Norton sought leave to file a Second Amended Complaint, which the Court granted on February 25, 1998. (R66-1; R73-1).

The Second Amended Complaint added two additional parties, Jean Louis Baldet and Lynda Quillen, and alleged factually that Norton had been discharged from her employment at the University following an extended controversy with the administration over her refusal to provide a report from a physician estimating the time she was expected to be remain unavailable to tend to her teaching duties due to recuperation from minor surgery. (R89-1 Pet. App. 44-47). The Count against the individual Defendants for alleged retaliation for exercise of First Amendment rights was amended to assert that Norton was discharged for pursuing the present action. (R89-14 Pet. App. 50-52). A new Count against the individual Defendants also alleged that the manner of Norton's discharge had deprived her of a property interest in her

employment with the University in violation of procedural due process rights under the Fourteenth Amendment. (R89-16 Pet. App. 53). The remainder of the pleading was essentially unchanged from the Amended Complaint.[1]

Each of the individual defendants and the BOR again moved to dismiss the Second Amended Complaint under Rule 12(b)(6); the individuals also asked for dismissal from the action on the ground of qualified immunity. (R78-1; R85-1; R86-1; R99-1; R107-1; R109-1; R110-1).

On December 30, 1998, the District Court entered a lengthy and detailed Order dismissing all Counts except that against the BOR alleging Equal Pay Act violations. (R128-1 Pet. App. 12). The claim under 42 U.S.C. § 1983 based upon alleged retaliation for exercise of First Amendment rights was dismissed with prejudice upon the ground that Norton's document request and litigation did not implicate matters of public concern. The District Court, having dismissed the claims against all of the individual Defendants with prejudice, deemed the Defendant's motions based upon qualified immunity to be moot and did not rule upon them. Norton's Motion for Reconsideration was denied on March 23, 1999. (R130-1; R153-1). The action then proceeded against the BOR as the sole Defendant. In January, 2000, Norton sought leave to amend her pleadings to add new claims against the BOR which the District Court denied. (R158-1; R162-1).

---

[1] The Second Amended Complaint was factually detailed and contained 59 incorporated exhibits – and totaled 119 pages in length. The Petitioner's Appendix includes only a fraction of these incorporated exhibits.

Norton then dismissed her remaining claim against the BOR and moved for entry of Final Judgment on May 4, 2000. (R170-1; R175-1).

The Court entered Final Judgment for all Defendants on June 1, 2000, and, on June 30, 2000, Norton filed her Notice of Appeal to the Circuit Court of Appeals, Eleventh Circuit. (R177-1; R178-1 Pet. App. 29). The Court of Appeals affirmed the judgment of the District Court in an unpublished opinion on November 6, 2001 (Pet. App. 1). Norton's motion for rehearing and rehearing *en banc* were denied on October 26, 2001 (Pet. App. 31, 32).

B. STATEMENT OF FACTS

Since the appeal below proceeded upon the District Court's dismissal of Norton's Second Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6), the facts recited herein are drawn exclusively from that pleading with its attached exhibits except for a reference to the Transcript of the hearing upon the Rule 12(b)(6) motions in respect to certain material representations made by Norton's trial counsel.

Sandra K. Norton had served as Dean of the College of Arts and Humanities of Florida Atlantic University from 1987 until her resignation from that position upon a vote of no confidence by the College faculty in July of 1994. (R89-17, 31 Pet. App. 52). Following her resignation as Dean, she remained a faculty member of the University until her termination in May, 1997. (R89-117)..

Florida Atlantic University is a State university operated at the time under the Board of Regents of the Division of Universities of the Florida Department of Education. (R89-2 Pet. App. 35).[2] During all or a portion of the time relevant to the allegations of the Second Amended Complaint, Anthony Catanese was President of the University; Richard Osburn was Provost; James Malek was Dean of the College of Arts and Humanities; David Anderson was Associate Dean of that college; Carla Coleman was Vice President of University Advancement; Jean Louis Baldet was Chairman of the Theater Department; Ondina Felipe was General Counsel for the University and Lynda Quillen was Associate Counsel. (R89-2, 3 Pet. App. 35, 36).

In 1991, Charles E. Schmidt, a local philanthropist and long time benefactor of the school, began contributing funds toward the establishment of two endowed chairs at the University which were initially denominated as Superchair I and Superchair II. (R89-3, 22 Pet. App. 36). Upon Norton's resignation as Dean in 1994, she was offered – and accepted – the position of Director of the University's Schmidt Institute for Comparative Studies.

In April of 1996, a dispute arose between Norton and the University administration when Norton claimed that the offer of the position of Director of the Schmidt Institute entitled her to hold one of the two Superchairs.

---

[2] The Board of Regents was abolished effective July 1, 2001, pursuant to a reorganization of the structure of higher education in the State of Florida. § 229.003(5)(A), *Florida Statutes* (2001).

(R89-6, 43 Pet. App. 41). According to Norton's allegations, Malek – then Dean of the College of Arts and Humanities – had allocated some of the funds earned from one of the Superchair endowments to new programs at the College. (R89-6 Pet. App. 40). Norton alleged that this irritated Schmidt and that President Catanese, seeking to "mollify" him, wrote Schmidt a letter on April 29, 1996 detailing the University's efforts at establishing a search committee to identify "two world-class scholars" to hold the chairs. (R89-6, 43 Pet. App. 41).

In the subsequent course of Norton's dispute with the University, she retained a law firm which, on her behalf, made a request under State law for public records. (R89-7 Pet. App. 41-42). Norton's pleadings specifically describe in somewhat convoluted fashion the purpose for which she sought access to those public records:

> 48. Dr. Norton acted within the scope of protected First Amendment rights where she communicated with University officials to obtain documents from the University *to substantiate the position taken by the University that she was not the occupant of Superchair II.* (emphasis added) (R89-14, Pet. App. 50).
>
> . . .

When she did not receive all the records she wanted, Norton, through her counsel, instituted a Mandamus action in State court to obtain those records. (R89-7 Pet. App. 42). The State Court granted Norton's petition and ordered release of the additional documents sought by her. (R89-7 Pet. App. 42). The University, allegedly through Vice President Coleman, issued a press release on September 5, 1996, advising that Catanese had

released the documents – consisting of correspondence between Schmidt and himself – in compliance with the State Court order of August 30. There was no indication that the release was reported by the press. (R89-45).

Norton alleged that Catanese, Osburn, Malek, Anderson, Felipe and Coleman then conspired to retaliate against her for her action in seeking access to the documents and in seeking a "redress of grievance in a court of law" by pursuing her Mandamus action. (R89-8 Pet. App. 42-43, 50). She claimed that retaliation included the seizing of books and records in her office which were available from other sources; the posting of a guard at her office to make note of anyone entering or leaving; threatening discharge if she did not execute her annual employment contract without unilateral changes; undertaking a "witch-hunt" to attempt to uncover financial irregularities in her expenditures, and otherwise embarrassing her in front of colleagues and students. (R89-8, 9 Pet. App. 43).

Norton filed the present lawsuit on January 7, 1997, alleging claims against Florida Atlantic University, Catanese, Osburn, Malek, Anderson, Felipe and Coleman. (R1-1). These claims, all arising out of Norton's personal employment dispute with the University, included a Federal claim under 42 U.S.C. § 1983 alleging that the individual Defendants took retaliatory action against her in response to her efforts to obtain the documents which she believed would assist her in supporting her claim of entitlement to one of the endowed chairs; an Equal Pay Act claim against the University, and two State law claims against the University relating to her claim to be a holder of the chair. On January 14, 1997, she requested medical

leave from Jean Baldet, her departmental chairman for a scheduled surgery to remove a sinus cavity growth. (R89-9 Pet. App. 44-45). At the time she indicated that she expected to return to teach her theater seminar class by January 27. (R89-88).[3] When she failed to return as she had originally advised, Baldet was forced to attempt – with limited success – to locate other faculty to assume charge of Norton's class on an *ad hoc* basis. This situation continued on a "week by week" basis as Norton repeatedly gave Baldet projected return dates, and, before each such date, gave short notice that she would be unable to make the date. (R89-9, 73, 74 Pet. App. 44). After Norton failed to meet several of these projected return dates, Quillen wrote Norton's attorney requesting that Norton provide a statement from her treating physician as to when Norton could be expected to return to her class (at that point it had been without a regular instructor for over a month). (R89-51).

Rather than comply, Norton's attorney demanded to know the legal authority for the request. (R89-52). Quillen provided her a citation to the relevant provisions of the Florida Administrative Code, but Norton's counsel remained unsatisfied. (R89-54, 56). Correspondence continued over the next several weeks between Norton's attorney and both Quillen and the trial counsel for FAU/BOR; deadlines for compliance were given and extended. (R89-57-65).

---

[3] This class which began the Winter semester on January 6, 1997 met weekly for 3 hours; Norton only met with her students the first two sessions. (R89-73, 74).

Finally Norton was given an ultimatum that, if she failed to provide the requested statement by March 3, 1997, she would be regarded as having abandoned her job. (R89-43).

Norton never provided the physician's statement, but alleges that she returned to her office on March 3, 1997 – during Spring Break – and picked up some papers for her class. (R89-11, 12 Pet. App. 47).

On March 6, 1997, Osburn forwarded to Norton a letter by overnight delivery advising that the University intended to terminate her employment for cause due to her failure to provide the requested statement. (R89-66). The letter provided a detailed notice of the grounds for her proposed discharge – recounting the need that the University had to determine when she could resume regular attendance of her class sessions and setting forth a listing of the many instances during Norton's leave period when she had given projected return dates, only to cancel them on short notice to the detriment of the students. (R89-68, 69). Attached to it was the provision of the Florida Administrative Code setting forth the University's 3 Step grievance procedure. (R89-68, 69).

Pursuant to Administrative Code procedure, Norton requested a Step 1 grievance meeting before the Associate Provost as hearing officer. (R89-70). Norton and her counsel were present, as were Dean Malek and his counsel and counsel for the University. (R89-70). Each party submitted statements and documentation, and the representative prepared a report with findings and a proposal for resolution on April 16, 1997. (R89-70-78). This proved

unacceptable to Norton who requested a Step 2 proceeding which was held on May 1, 1997, before a second hearing officer. (R89-116). Present were the same parties and counsel as at the Step 1 meeting. (R89-116, 117). On May 2, 1997, the hearing officer filed a decision finding no merit in Norton's exceptions to the proposed discharge and noting that resolution of the dispute was not attainable. (R89-116).

Norton chose not to proceed with the Step 3 review, and, instead, sought leave to file a Second Amended Complaint. (R66-1). In this pleading, Norton charged that she had been the recipient of retaliatory action by the individual Defendants as a result of her pursuit of the documents she felt might be relevant to her dispute over the Superchair position and as a result of her filing the present action. (R89-14, 15 Pet. App. 50). She also charged that the individual Defendants (except Coleman) deprived her of her procedural due process rights in the course of the discharge hearings – contending that the meetings were not held before impartial representatives. (R89-16, 17 Pet. App. 53-54). She reasserted the claims against the BOR that she had previously made. (R89-18-21 Pet. App. 54-58). The Defendants each moved for dismissal pursuant to Rule 12(b)(6). All individual Defendants challenged the First Amendment retaliation claims on the same ground raised in their motion directed to the earlier pleadings – that those activities undertaken by Norton were not protected speech or actions under the First Amendment since they did not implicate matters of public concern; they challenged the validity of the due process claim on the ground that procedural due process did not require an administrative hearing before an

"impartial" officer and that Norton's pleadings established that she had failed to comply with all available steps of State remedial procedures. (R78-1; R85-1; R86-1; R92-1; R99-1; R107-1; R109-1; R110-1). In addition, each Defendant raised the defense of qualified immunity. (R78-2, R85-5; R86-5; R92-2; R99-2; R107-2; R109-1, 2; R110-1, 2).

The BOR also moved for dismissal on several grounds. (R91-1).

In the course of the hearing upon these motions, there was extensive discussion of the First Amendment issue; the Defendants' counsel argued that the request for documents and the Mandamus action as well as the filing of the present action did not constitute protected speech or petition under the First Amendment since both speech and petition actions by government employees were required to satisfy the element of public concern as established in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). (R182-1 et seq.). The Defendants argued that the very terms in which the allegations of the Second Amended Complaint were cast indicated that the actions did not encompass "public concerns". Norton's counsel did not dispute this; instead, she frankly admitted that Norton's actions did not encompass matters of public concern. (R182-31).

The District Judge dismissed the claims against all individual Defendants on December 30, 1998. (R128-1 Pet. App. 12-27). Norton never requested leave to further plead against the individual Defendants.

REASONS FOR DENYING THE PETITION

I

THE PETITIONER'S FIRST ARGUMENT FOR CERTIORARI REVIEW SHOULD BE REJECTED FOR TWO REASONS: FIRST, THE CONFLICT IDENTIFIED BY THE PETITIONER IS LIMITED IN EXTENT, INVOLVING ONE DECISION IN ONE CIRCUIT ON ONE SIDE AND THE GREAT MAJORITY OF CIRCUITS INCLUDING THE ELEVENTH CIRCUIT, ON THE OTHER, AND SECOND, A RULING UPON THE ISSUE IN THIS CASE WOULD NOT BE MEANINGFUL IN RESOLVING THE DISPUTE BETWEEN THE PARTIES SINCE, EVEN IF THE "PUBLIC CONCERN" ELEMENT WERE HELD INAPPLICABLE TO PETITION CASES, THE RULE APPLYING IT WAS ESTABLISHED IN THE ELEVENTH CIRCUIT AT THE TIME OF THE ALLEGED RETALIATION AND THE DEFENDANTS WOULD STILL BE ENTITLED TO DISMISSAL UPON QUALIFIED IMMUNITY AS THEIR ALLEGED CONDUCT WAS NOT CLEARLY UNLAWFUL AT THE TIME IT OCCURRED.

The Petitioner first seeks certiorari review arguing that there is a significant and broadly based conflict among the Circuits upon the issue of whether the "public concern" threshold test announced in *Connick v.. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), and applied in that case to a First Amendment free speech/ retaliation claim by a public employee should also be applied in cases involving claims of retaliation for the exercise of the First Amendment petition right by public employees.

The Respondents submit that the conflict among the Circuits on this issue is much less significant and more

narrowly based than suggested by the Petitioner, and urge this Court to deny the Petition both because the conflict is one of a lesser dimension than contended and because a decision upon the issue in this Cause can have no impact upon the final determination of the claim.

Although conflict of decisions among the Circuits are a potential basis for the exercise of certiorari review by this Court under Supreme Court Rule 10, conflict in and of itself is not always a sufficient basis for such review. See *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 79 S.Ct. 710, 3 L.Ed.2d 723 (1959); *Beaulieu v. United States*, 497 U.S. 1038, 110 S.Ct. 3302, 111 L.Ed.2d 811 (1990) (White, dissenting); *Stuckett v. United States Postal Service*, 469 U.S. 898, 105 S.Ct. 274, 83 L.Ed.2d 210 (1984) (White, dissenting); *Greco v. Orange Memorial Hospital Corp.*, 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376 (1975).

A careful analysis of the cases from the several Circuits does not disclose a conflict of the dimensions suggested in the Petitioner's argument. Only one Circuit, in one decision, has held that the "public concern" test enunciated in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) does not apply to claims of retaliation in connection with a governmental employee's exercise of his right to petition under the First Amendment. A split panel of the Third Circuit in *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994), *cert. denied*, 513 U.S. 1082, 115 S.Ct. 735, 130 L.Ed.2d 638 (1995), has held that a governmental employee's civil rights claim alleging retaliation by his employer for the employee's exercise of his right to petition is not subject to the "public concern" requirement of *Connick*. The other cases cited by the

Petitioner as being in conflict upon this issue do not in fact conflict with the decision below – nor with the overwhelming majority of Circuits which have ruled upon this matter.

Gable v. Lewis, 201 F.3d 769 (6th Cir. 2000), the first case cited by the Petitioner to be in conflict with the present case, did not involve a governmental employer/employee relationship. The plaintiff in that case received tow referrals from the State Police. Since an employer/employee relationship did not exist, the Court's discussion of governmental employment cases by analogy is merely dicta. The status of this issue in public employment cases in the Sixth Circuit appears unsettled. See *Rice v. Ohio Dept. of Transp.*, 887 F.2d 716 (6th Cir. 1989), *cert. denied*, 512 U.S. 1207, 114 S.Ct. 2678, 129 L.Ed.2d 812 (1994) and *Valot v. Southeast Local School Dist. Bd. of Education*, 107 F.3d 1220 (6th Cir. 1997), *cert. denied*, 522 U.S. 861, 118 S.Ct. 164, 139 L.Ed.2d 108 (1997).

In *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir. 1990), the Tenth Circuit held that the plaintiff's petition claim *was* subject to the "public concern" analysis. Prior to its discussion of the petition claim, the Court considered the plaintiff's related freedom of association claim. Finding this claim to be one involving the matter of "expressive association", the Court held it to be subject to the "public concern" analysis, but, in a footnote, suggested that "intimate association" claims might not be subject to the "public concern" analysis. See Strauss, Note: *Public Employees' Freedom of Association: Should Connick v. Myers' Speech-Based Public-Concern Rule Apply*, 61 Fordham L.Rev. 473, 476-482 (1992). Turning then to the petition claim, the Court held that " . . . we see no reason to

subject this claim to a different sort of analysis." *Schalk* at 498. The analysis to which the Court subjected the petition claim was the same to which it subjected the "expressive association" claim – one which includes a "public concern" element. There is no suggestion in the *Schalk* opinion that petition claims are analogous to the "intimate association" claims – a category in which it suggests that a "public concern" element might not apply.

The case of *Harrison v. Springdale Water & Sewer Com'n*, 780 F.2d 1422 (8th Cir. 1986), next cited by the Petitioner, involved a dispute arising out of an inverse condemnation matter rather than a public employer/employee relationship.

Finally, the case of *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) was a claim by a prisoner who alleged that he suffered retribution by prison officials as a result of the exercise of his petition right. It, too, did not involve the governmental employer/employee relationship.

This Court found the "public concern" element enunciated in *Connick* to be necessitated by the public employer/employee relationship and the need to protect the interests pertaining to each party in such a relationship. Whether the "public concern" test is appropriately applied in non-public employment situations is an issue irrelevant to the holding by the Court below.

The decision of the Eleventh Circuit, herein, is in accord with the rule adopted by the vast majority of Circuits: *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993), *cert. denied*, 510 U.S. 865, 114 S.Ct. 185, 126 L.Ed.2d 144 (1993); *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989); *Day v. South Park Indep. Sch. Dist.*,

768 F.2d 696, 700 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101, 106 S.Ct. 883, 88 L.Ed.2d 918 (1986); *Zorzi v. County of Putnam*, 30 F.3d 885 (7th Cir. 1994); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261 (7th Cir. 1988); *Altman v. Hurst*, 734 F.2d 1240, 1244 (7th Cir. 1984); *Hoffman v. Mayor, Councilmen and Citizens of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990); *Rendish v. City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997), *cert. denied*, 524 U.S. 952, 118 S.Ct. 2368, 141 L.Ed.2d 737 (1998); *Gearhart v. Thorne*, 768 F.2d 1072 (9th Cir. 1985); *Martin v. City of Del City*, 179 F.3d 882 (10th Cir. 1999); *Grigley v. City of Atlanta*, 136 F.3d 752 (11th Cir. 1998), *cert. denied*, 525 U.S. 819, 119 S.Ct. 59, 142 L.Ed.2d 47 (1998). In addition to those cases applying the "public concern" element where the plaintiff's claim was characterized as one implicating the petition right, the same result has been reached in a number of cases in the Circuits where actions such as the filing of claims or lawsuits were characterized as exercises of free speech. See e.g. *Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221, 114 S.Ct. 2708, 129 L.Ed.2d 836 (1994).

With the exception of the Third Circuit's solitary decision in *San Filippo* and some uncertainty within the Sixth Circuit – in view of the dicta in *Gable v. Lewis*, supra, the holding in *Rice v. Ohio Dept. of Transp.*, supra, and the questionable holding in *Valot v. Southeast Local Sch. Dist.*, supra – the Circuits which have addressed this issue are otherwise in unanimous accord. The status of the law upon this issue is no more unsettled today than it was when this Court denied certiorari in the *Rendish* and *Grigley* cases. No greater imperative for review lies in the present circumstance.

A second basis exists for the refusal to accept certiorari review upon this issue: no matter how the issue is determined, a decision by this Court upon the foregoing issue cannot result in an outcome different from that which presently exists. Consequently a ruling upon this issue would serve only a theoretical purpose.

In their motions to dismiss, each Defendant below raised the issue of qualified immunity, a defense properly raised in a motion to dismiss. See *Ansley v. Heinrich*, 925 F.2d 1339, 1347 (11th Cir. 1991).

At the time of the actions alleged to have been taken by the Defendants, the established law in the Eleventh Circuit clearly held that such actions taken by an employer or its agents in a public employment situation were not unlawful. See *Badia v. City of Miami*, 133 F.3d 1443, 1446 (11th Cir. 1998) and *Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221, 114 S.Ct. 2708, 129 L.Ed.2d 836 (1994). In view of his ruling upon the issue of liability *vel non*, the District Judge held that the issues of qualified immunity raised by the Defendants was moot, and he declined to rule upon them. A reversal of the decision upon liability below would then require the District Court to address the issue of immunity. It is apparent that, even if the rule of the Eleventh Circuit applying the "public concern" element to petition cases were reversed, that rule, existing at the time of the actions taken, would nonetheless require a dismissal of all Defendants upon the ground of qualified immunity.

This Court's statement in *The Monrosa v. Carbon Black Export, Inc.*, supra, is fully applicable here:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly.

359 U.S. at 184

Since a decision by this Court, even if adverse to the decision of the Court below cannot affect the outcome of this litigation, the Respondents would urge that this court decline the invitation to enter into the realm of deciding abstract questions of law.

II

THE PETITIONER'S SECOND ARGUMENT FOR CERTIORARI REVIEW SHOULD BE REJECTED SINCE THE CONFLICT AMONG THE CIRCUITS IDENTIFIED BY THE PETITIONER IS ILLUSORY AND SINCE THE FACTS ALLEGED BELOW CLEARLY ESTABLISH THE PROPRIETY OF APPLYING THE "PUBLIC CONCERN" RULE AS WAS DONE BY THE COURTS BELOW.

The Petitioner also seeks certiorari review arguing that the Circuits are split upon the issue of whether the *Connick* rule applies in cases where the public employee has expressed himself or petitioned upon a matter of personal interest rather than of "public concern". She contends that the court below held that the presence of any "personal intent" element deprives expression or

petition from constitutional protection. Her argument misconstrues the facts of this case, the holding of the Court below and the status of the law among the Circuits.

Norton's Second Amended Complaint identified two sets of actions which she characterized as acts of petition and for which she alleged that she sustained retaliation by the Defendants: the first consisted of her seeking documents upon a public records request for the specified purpose of supporting her position in a personal employment dispute with the University and, subsequently, in her filing of a Mandamus action in State Court to compel production of those records not voluntarily produced; the second set of actions consisted of her bringing and maintaining the current lawsuit prior to the time of her discharge. These actions, on account of which Norton alleges that the Defendants retaliated against her, were, however, focused solely upon her long-running personal employment dispute with the University and were devoid of any element of "public concern".

In Paragraph 48 of the Second Amended Complaint, Norton alleged the purpose for which she sought to obtain the documents through the document request and subsequent Mandamus proceeding. In her Petition, Norton is understandably reticent in identifying this allegation which clearly and directly establishes that the focus of her action was in seeking support for her position in an employment dispute regarding whether she was the proper holder of an endowed chair. Paragraphs 25 and 26 of the Second Amended Complaint further establish the background to this employment dispute in furtherance of which she sought evidence to support her claims. The dispute as alleged was an essentially personal one

between Norton and the University. This was the allegation of the Second Amended Complaint and the findings of the District Court and Court of Appeals below.

Just as Norton's document quest was in pursuit of an essentially personal employment dispute, so too the present action through the time of her discharge involved issues which were no more than a continuation and outgrowth of that same employment dispute. The claims brought against the individual Defendants under 42 U.S.C. § 1983 simply sought relief for what Norton claimed was retaliation for those actions taken in support of her employment dispute. The claim against the University for alleged violation of the Equal Pay Act alleged that the University had discriminated only against Norton in respect to matters of employment compensation on account of her sex – it did not allege a general course of discrimination impacting other women at the school. The state law claims sought direct relief for the alleged breach of an employment contract. Since all of these claims, as alleged, involved an essentially personal dispute between Norton and the University, the "public concern" element was clearly lacking.

Although Norton now contends that her personal interest in the Mandamus action was secondary to some greater interest in seeking to bring into the public arena documents – primarily correspondence – relating to the benefactor's intent as to the person who was to hold the endowed chair, the fact remains uncontroverted that she sought them in the course of a personal employment dispute for the purpose of hopefully supporting *her* right to be seated as holder of the endowed chair. Essentially

she seeks to constitutionalize what was, and has been, a personal contract dispute.

Petitioner contends that the Circuits are split upon the effect of the element of a public employee's personal interest in First Amendment cases. A careful reading of the cases cited by the Petitioner demonstrates that the conflict is illusory, and that each case appropriately follows the rule laid down in *Connick v. Myers*, supra, that where the content, form and context of a public employee's speech establishes that its dominant focus is upon the employee's personal employment interest rather than upon matters of public concern, then the Federal Courts are not the appropriate forum for the review of the issues involved in such an employment dispute. 461 U.S. at 147-148.

In the line of cases that Petitioner groups with *Tao v. Freeh*, 27 F.3d 635 (D.C. Cir. 1994), it can be seen that each claim involved a significant element of public concern. Thus, in *Tao*, the court noted that the speech in issue raised issues of widespread racial discrimination against Chinese-Americans in the FBI. *Id.* at 640. In *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990), *cert. denied*, 501 U.S. 1204, 111 S.Ct. 2796, 115 L.Ed.2d 970 (1991), the issue raised by the charges filed related to pervasive and systematic racial discrimination in the Chicago police department. In *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir. 1988), the issue raised by the speech involved – a press interview – was pervasive racial animus within the Pennsylvania state patrol. In *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996) the speech involved – an anonymous letter – raised the concerns of an informal association of some 30 black officers to widespread racial discrimination in the

Greenville County Sheriff's office. In each case, the speech clearly addressed matters which extended well beyond the immediate, personal employment dispute which the individual plaintiff had with his governmental employer and addressed matters of such scope and content as to fall within the purview of "public concern".

By contrast, in *Grigley v. City of Atlanta*, supra, the plaintiff's action – pursuing criminal charges against another officer arising out of a personal, physical confrontation in another jurisdiction – was found to have no implication for public concern. In *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522 (11th Cir. 1997) the plaintiff's action was the filing of an *ante litem* claim in pursuit of an action claiming that the plaintiff had been discriminated against due to a disability. There was no indication of discriminatory conduct extending beyond the plaintiff, himself. Finally, in *Badia v. City of Miami*, supra, the plaintiff claimed that she was discharged after filing a complaint with the EEOC regarding a personal employment discrimination claim and, subsequently, filing a suit on the claim. The Court ruled only on the issue of qualified immunity, noting that in the absence of clear prior authority in the Circuit finding a discharge upon this basis to be a violation of rights, qualified immunity would apply.

In each of the cases identified by the Plaintiff in this second line of cases, the speech or petition action concerned only a claim of discrimination personal to the plaintiff/employee. The two lines of cases thus do not establish the clear conflict contended by the Petitioner, nor do the facts of this case and the rulings below demonstrate conflict with either line of cases.

CONCLUSION

For the reasons set forth above, the Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

MICHAEL B. DAVIS
PAXTON & SMITH, P.A.
Barristers Building, Suite 500
1615 Forum Place
West Palm Beach, FL 33401
Phone: (561) 684-2121
Fax: (561) 684-6855
FL Bar No. 118140

Counsel for Respondents